APPENDIX A

CAN CONGRESS TAKE AWAY CITIZENSHIP?

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> The most difficult character in comedy is that of a fool, and he must be no simpleton who plays the part.—Don Quixote.

It has been written that ". . . the power to provide for loss of citizenship is an inherent attribute of Congress, vital to maintaining the sovereignty of the United States in the area of foreign relations—and to argue otherwise would really be windmill tilting. . . ."[1] The statement depended for authority upon its own assertion.

Now if a windmill be real, and its only function is to serve man, there would, of course, be no purpose in couching the lance and rushing madly at the device. But if, as Don Quixote imagined his windmill to be, the contraption is really a tyrant bent upon robbing man of personal liberty and disguised as a windmill only for the purpose of deception, then failure to attack may well result in the loss of all those liberties which Americans have been most vigilant to protect. Both philosophically and legally there is good cause to war against any power claimed for the Congress to take away citizenship, for if citizenship be lost, all is lost.

I. THE VALUE OF CITIZENSHIP

Before examining the question of Congressional power, it may be well to reflect upon the nature of citizenship—not citizenship in general, but citizenship in the United States. Americans are inclined to think about their privileges

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[1] Roche, *The Loss of American Nationality—The Development of Statutory Expatriation*, 99 U. PA. L. REV. 25, 27 (1950).

and immunities in specific terms. They desperately defend their freedom of speech, press, assembly and religion. They claim the right to a fair and open trial. They assume it is their right as Americans to live under the protection of equal laws. Neither slavery nor involuntary servitude can exist in America. Freedom to travel from place to place within the country, freedom from arbitrary arrest, participation in the law making process—all those rights which spring from constitutional guarantees are likely to be listed by any citizen as the specific benefits of citizenship.

However, the Constitution speaks more often of persons than of citizens. Many of the great guarantees of personal liberty are the result of constitutional limitations which make it impossible for the government to enact or enforce any law which would abridge the liberties of any person. The right of a person to speak his mind or to worship as he pleases is not his because he is a citizen. He enjoys such rights because he is here and the Constitution forbids any agent of government to interfere with them.[2] The right to a fair trial and to the protection of equal laws may be claimed by the alien within our borders as well as by the citizen.[3] Habeas corpus is available to citizen and alien alike.[4] The point, established by many decisions, need not be labored here. It is clear that the enjoyment of practically all of the rights which a person might think of as possessed by citizens and as contributing to

[2] Kwong Hai Chew v. Colding, 344 U.S. 590 (1953); Douglas v. City of Jeanette, 130 F.2d 652 (3d Cir. 1942), *aff'd*. 319 U.S. 157 (1943).

[3] Truax v. Raich, 239 U.S. 33 (1915).

[4] For cases in which habeas corpus has been employed as the instrument for testing validity of detention of aliens, see United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954); Kwong Hai Chew v. Colding, 244 U.S. 590 (1953); Yamataya v. Fisher, 189 U.S. 86 (1903).

the value of citizenship depend upon something *other* than the mere fact that a person is a citizen.[5]

The alternative to citizenship is alienage.[6] Perhaps the value of citizenship can best be brought into focus by looking to the status of the alien. The alien within our borders enjoys the same fundamental protections as the citizen and while within our borders owes temporary allegiance to the United States. It was long ago declared, in discussing the status of the alien within our borders, that:

> While he lawfully remains here, he is entitled to the benefits of the guaranties of life, liberty and property, secured by the Constitution to all persons, of whatever race, within the jurisdiction of the United States. His personal rights when he is in this country, and such of his property as is here during his absence, are as fully protected by the supreme law of the land, as if he were a native or naturalized citizen of the United States.[7]

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[5] The author is not unaware of such pronouncements in different contexts as: "The right to peaceably assemble and petition for redress of grievances, the privilege of writ of *habeas corpus*, are rights of the citizen guaranteed by the Federal Constitution. The right to use the navigable waters of the United States, however they may penetrate the territory of the several States, all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States. . . ." Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79 (1872). It may also be admitted that certain privileges such as the suffrage and qualification for public office may be extended to citizens to the exclusion of aliens. But these privileges are not universal for all citizens and do not depend upon citizenship for their enjoyment. Harisiades v. Shaughnessy, 342 U.S. 580, 586 (1952).

[6] There is also the status of "national", recognized and created by the Congress. The national has some of the disabilities of the alien and some of the privileges of the citizen. See McGovney, *Our Non-Citizen Nationals, Who Are They?*, 22 CALIF. L. REV. 593 (1934).

[7] Lem Moon Sing v. United States, 158 U.S. 538, 547 (1895).

The major difference, then, between citizen and alien appears in all its stark reality when the nation withdraws its hospitality and requests the alien to withdraw or be cast out. It is the right to be here; to stay in the United States, a country where constitutional limitations make a person free from the oppressive hand of an arbitrary and tyrannical government, that gives United States citizenship its real and abiding value. This right to belong, this right to stay, connotes a permanent membership in a state composed of free people. As it was put by Chief Justice Waite:

> There cannot be a nation without a people. The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection.[8]

One can hardly be said to be entitled to anything at the hands of a government if that government has the power to cast a person out. That the nation has such power over *aliens* is now beyond question. "The Government's power to terminate its hospitality (to aliens) has been asserted and sustained by this Court since the question first arose."[9] It follows then, that if the Congress

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[8] Minor v. Happersett, 88 U.S. (21 Wall.) 162, 165 (1874). *Cf.* United States v. Minker, 350 U.S. 179 (1956); Schneiderman v. United States, 320 U.S. 118, 120 (1943); United States v. Cruikshank, 92 U.S. 542, 549 (1875); Dred Scott v. Sanford, 59 U.S. (19 How.) 393 (1856); Passenger Cases, 48 U.S. (7 How.) 283, 492 (1849).

[9] Harisiades v. Shaughnessy, 342 U.S. 580, 587 (1952). *Accord*, Carlson v. Landon, 342 U.S. 524, 534 (1952); Yamataya v. Fisher, 189 U.S. 86, 97 (1903); Fok Yung Yo v. United States, 185 U.S. 296, 302 (1902); Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892). The source of the nation's power to exclude and deport aliens in the foregoing cases was ". . . the sovereign right to determine what non-citizens shall be permitted to remain within our borders." Carlson v. Landon, *supra* at 534. The power had previously been found in the power of Congress to regulate foreign commerce. Chinese Exclusion Cases, 130 U.S. 581 (1889).

can take away citizenship, all the rights which the citizen so firmly believes to be unalienable may vanish over the horizon, out of sight and reach of the ship which bears him into exile or returns him to some land from whose horrors and tortures he or his ancestors fled to our shores.[10] For to take away a person's citizenship is to make him an alien, subject to deportation.

II. The History of Statutory Deprivation of Citizenship

The question of Congressional power to deprive a person of his citizenship has not always been with us. It seems desirable at this point to trace, very briefly, the development of the relatively modern statutes imposing involuntary loss of citizenship upon various classes of persons. This history has been amply presented by others[11] and only enough need to be set out here to define our problem.

The first attention given by Congress to the matter of loss of citizenship was its statutory recognition of the right of any person to renounce his allegiance.[12] By that statute, the Congress announced this nation's policy that each individual had the "natural and inherent" right to effect voluntary expatriation from the country of his allegiance. Beyond its recognition of the right in the individual person to give up his citizenship and acquire that of another country, Congress left the matter of loss of citizenship unregulated until 1907.

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[10] For a brief discussion of the international problems and the condition of the stateless person, see Comment, 30 Am. J. of Int. Law 495 (1936). For a vivid example of the hopelessness of a man without a country, see Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953).

[11] *Developments in the Law—Immigration and Nationality*, 66 Harv. L. Rev. 643 (1953); Roche, *The Loss of American Nationality—The Development of Statutory Expatriation*, 99 U. Pa. L. Rev. 25 (1950).

[12] Act of July 27, 1868, c. 249, § 1, 15 Stat. 223.

By the Act of March 2, 1907,[13] an American citizen was "deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state." The act also provided that ". . . any American woman who marries a foreigner shall take the nationality of her husband." Another provision declared that if a naturalized citizen returned to the country of his former allegiance and lived there for two years, he was presumed to have expatriated himself. These provisions were interpreted in different ways at different periods of time by both the executive departments and the courts. The provision concerning women marrying foreigners was the only one, by its language resulting in automatic loss of citizenship from performance of the specified act. Hopeless confusion resulted from use of such terms as "deemed" and "presumed" in other sections of the statute.[14] As might be expected, such terms were usually interpreted to create something in the nature of a prima facie case of expatriation from performance of the act. This is not the place to report the details of interpretation. The significant matter here is that in the 1907 legislation, which prevailed for the most part until 1940, Congress did not seem disposed, except in the case of women marrying foreigners,[15] to provide for automatic loss of citizenship.

Comprehensive legislation in 1940,[16] codifying and revising all the laws relating to naturalization and loss of citizenship and calculated to provide more readily applicable objective standards for determining who should

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[13] c. 2534, 34 STAT. 1228 (repealed by 54 STAT. 1172 (1940)).

[14] For an adequate analysis of the various interpretations placed upon these terms, see Roche, *supra* note 11.

[15] The Cable Act, c. 411, § 3, 42 STAT. 1022 (1922), eliminated this provision.

[16] 54 STAT. 1137 (1940), as amended, 8 U.S.C. §§ 1401-1503 (1952).

be separated from the body politic, provides: ". . . a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by . . . ." obtaining naturalization in another country upon an application filed by himself, a parent, guardian, or agent, or through the naturalization of a parent; taking an oath of allegiance to a foreign state; entering or serving in the armed forces of a foreign state; accepting any office or employment under a foreign government if he has or acquires the nationality of such government; accepting any office or employment under a foreign government for which office an oath of allegiance is required; voting in a foreign political election; making a formal renunciation of nationality before an official; making in the United States a formal written renunciation; deserting the military forces of the United States in time of war; committing any act of treason against, or attempting by force to overthrow, or bearing arms against the United States; and departing or remaining outside the United States in time of war for the purpose of evading or avoiding training and service in the armed forces. Other parts of the statute provide for loss of citizenship by dual nationals or by naturalized citizens who are abroad or who go abroad, except for certain specified reasons, and do not return within a period of a few years, the length of time varying with the situation.

It is to be noted that the language used by the statute makes no provision for taking into account a person's intent or loyalty to the United States. It is also to be noted that, by the terms of the legislation, some of the acts listed do not necessarily in and of themselves serve as the basis for a strong inference that the person committing such acts is disloyal in the sense that he wishes to give up his citizenship and avoid all its duties. Other acts listed are recognized as crimes for which the punishment of imprisonment is already provided.

In reading over the category of acts which result automatically in loss of citizenship, one wonders why such things are not included as income tax evasion, investing money abroad, smuggling fire arms or untaxed liquor, and a hundred other things.

This legislation raises the very serious question whether it is within the power of Congress to divest a citizen of his status.

> Below the surface, the real issue constantly overlooked is whether Congress has the unilateral power to take away citizenship granted native-born by the Constitution itself. If is has not, may it find voluntary renunciation by reading into the doing of such colorless acts as it may specify, today or tomorrow, a really nonexistent intent or consent to forfeit a birthright? In brief, absent the factor of consent of both sovereign and the individual, is not native citizenship indestructible? If so, should not Congress confine itself to punishing citizens for treason and lesser crimes?[17]

And,

> To take away a man's citizenship deprives him of a right no less precious than life or liberty, indeed of one which today comprehends those rights and almost all others. To lay upon the citizen the punishment of exile for committing murder, or even treason, is a penalty thus far unknown to our law and at most but doubtfully within Congress' power.[18]

III. Validity of Statutory Denationalization

The history of Congressional provision for loss of nationality progresses from voluntary expatriation to loss of citizenship as a result of some act which may or may not have been done with any idea of losing citizenship,

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[17] McLaughlin, C. J., in Terada v. Dulles, 121 F. Supp. 6, 7 (D. Hawaii 1954).

[18] Rutledge and Murphy, JJ., concurring, in Klapprott v. United States, 335 U.S. 601, 616 (1949).

and which may or may not in itself be a crime. Many of the acts proclaimed by the statutes to result in loss of citizenship apply to natural born and naturalized citizens alike. Probably the initial motive which led Congress to provide for the loss of citizenship was the desire to avoid difficulties with other nations. But where natural born citizens are declared to lose their citizenship because of desertion from the armed forces or for violating the Smith Act, it is improbable that such desertion or violation of the Smith Act would involve this nation in international difficulties; and consequently the only purpose Congress could have had in mind in enacting such provisions was to impose additional punishment on the offender. It may be conceded that withdrawal of the right to stay in the United States is an effective sanction to punish draft dodging, desertion, subversion, or even tax evasion and many other things.[19] But the important question still remains. Does the Congress have the power to take away citizenship for any reason whatsoever?

A. The Doctrine of Sovereign Power.

It has been assumed by some authors that the power of Congress to take away citizenship is inherent in the sovereignty of the United States.[20] The Supreme Court of

[19] While Congress has yielded to the request by the executive branch for laws which would be more convenient to administer and which would eliminate the difficulty of deciding whether a particular person had expatriated himself, Congres has not, it seems, considered the disposition of those persons, natural born or naturalized citizens, who are divested of their citizenship but have no place to go or to be deported to because no other country will receive them. See Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953).

[20] Roche, *The Loss of American Nationality—The Development of Statutory Expatriation*, 99 U. Pa. L. Rev. 25, 27 (1950); Flournoy, *Revision of Nationality Laws of the United States*, 34 Am. J. Int. Law 36, 44 (1940).

the United States has dealt directly with the question but once. In *MacKenzie* v. *Hare*,[21] a woman citizen of the United States, having married an English national, was held to have lost her citizenship under the Act of March 2, 1907[22] which provided that ". . . any American woman who marries a foreigner shall take the nationality of her husband." It was not shown that Mrs. MacKenzie was aware of the effect of her marriage or that she had any intention to give up her citizenship. Indeed, both she and her husband continued to live in the United States, and when she presented herself for registration as a voter in California she was turned away as being ineligible because she had become an alien. She contended that Congress could not impose loss of citizenship upon her because of her marriage to a foreigner. Affirming her loss of citizenship, the Supreme Court explained:

> As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. We should hesitate long before limiting or embarrassing such powers. But monition is not necessary in the present case. There need be no dissent from the cases cited by plaintiff; there need be no assertion of very extensive power over the right of citizenship or of the imperative imposition of conditions upon it. It may be conceded that a change of citizenship cannot be arbitrarily imposed, that is, imposed without concurrence of the citizen. The law in controversy does not have that feature. It deals with a condition voluntarily entered into, with notice of the consequences.[23]

This is strange language. While it includes a dictum asserting a sovereign power to alienate the citizen, it pro-

[21] 239 U.S. 299 (1915).

[22] c. 2534, 34 STAT. 1228 (repealed by 54 STAT. 1172 (1940)).

[23] 239 U.S. at 311.

ceeds to disavow the dictum as the reason for the decision, concedes that citizenship cannot be taken away without concurrence of the citizen, and finds that Mrs. MacKenzie, in her voluntarily marrying a foreigner, voluntarily renounced her citizenship. The latter aspect of the case will be dealt with later. Suffice it to say, for now, that the case is not authority beyond the value of the dictum for the proposition that Congress has an unbridled sovereign power to take away one's citizenship as a means of dealing with international affairs. The authority of the dictum is nullified by the contradiction involved in the concession ". . . that a change of citizenship cannot be arbitrarily imposed, that is, imposed without concurrence of the citizen."

The only other case in which a federal court has assumed a sovereign power in Congress to deprive a person of citizenship is *Ex parte Griffin*.[24] The petitioner Griffin went to Canada with his family and there enlisted in the Canadian army, taking an oath of allegiance to the King. Weeks later he tired of the life and returned to the United States where he was taken into custody as an alien. The government invoked the Act of March 2, 1907,[25] claiming that the petitioner had lost his citizenship as a result of taking the oath. The Court held the petitioner to have lost his citizenship and, citing *MacKenzie*, said:

> [T]he sovereign power, through Congress, may declare that the doing of certain acts, inconsistent with citizenship in the United States, shall constitute expatriation—loss of or renunciation of citizenship. . . . There is no express grant of such power to Congress found in our Constitution. But there are powers implied necessary to the exercise of a government or a nation—necessary to the exercise of sovereignty. This is one.[26]

[24] 237 Fed. 445 (N.D. N.Y. 1916).

[25] c. 2534, 34 Stat. 1228 (repealed by 54 Stat. 1172 (1940)).

[26] 237 Fed. at 453.

This decision has nothing but the questionable dictum of the Supreme Court in the *MacKenzie* case to support it, but it should be noted in passing that the result is probably right and could have been reached, without straining for an implied power, on a finding of fact that what the petitioner did evidenced his desire voluntarily to leave the United States behind and take up citizenship and allegiance in Canada—that he had voluntarily expatriated himself.

One other case decided by the District Court for the Western District of Washington, *Ex parte (Ng) Fung Sing*,[27] should probably be included here because of a bare suggestion that sovereignty might be sufficient basis for involuntary loss of citizenship. A woman of Chinese descent was born in the United States. She was taken to China at a tender age, married a Chinese alien there, and sought to return to the United States at the age of 27. The same provision of the Act of March 2, 1907 which was involved in *MacKenzie* was invoked as the basis for her loss of citizenship. The court, holding that (Ng) Fung Sing had lost her citizenship, reasoned that "citizenship is a political status, and may be defined and the privilege limited by Congress. The Congress has, no doubt, power to say what act shall expatriate a citizen and forfeit right to 'protection abroad'."[28]

The validity of statutory withdrawal of citizenship has been upheld in three other cases whose authority is not persuasive. The first, involving voting in a local primary election in Mexico by a person who had citizenship of both Mexico and the United States, held that the provisions of the Nationality Act of 1940 ". . . bind the courts unless it can be said that they are clearly unconstitutional, a conclusion without rational foundation."[29] But no argument

[27] 6 F.2d 670 (W.D. Wash. 1925).

[28] *Ibid.*

[29] Miranda v. Clark, 180 F.2d 257, 259 (9th Cir. 1950).

was made or cases cited which established constitutionality so firmly. The second case held (apparently without the issue having been raised or argued) that "the statute which lists these acts[30] is constitutional,"[31] citing the preceding case as authority for the proposition. The case was reversed by the Supreme Court in a Per Curiam decision,[32] ruling that the standards of proof in expatriation cases are the same as in denaturalization cases[33] and that the standards had not been met. No opinion was expressed on the question of constitutionality. The third case which might be cited as authority for the validity of statutory extinguishment of citizenship as a result of doing some of the acts listed in the Nationality Act of 1940—in this case remaining outside the United States to avoid military duty—was summarily disposed of in the following words: "Appellant says that Section 801(j) was unconstitutional. However, we have held that it was constitutional, and we now reaffirm that holding."[34]

These are the only authorities supporting the proposition that Congress can take away citizenship. They are not persuasive. The argument, if any, in these cases is that somewhere in the Constitution of the United States the Congress is vested with powers inherent in sovereignty which are sufficient to support severance of the nation-citizen relationship.

The doctrine that Congress possesses sovereign powers such as that claimed in the foregoing cases overlooks both

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[30] The acts specified in the Nationality Act of 1940 as expatriating—in this case staying in Mexico to avoid military duty.

[31] Gonzales v. Landon, 215 F.2d 955, 957 (9th Cir. 1954).

[32] Gonzales v. Landon, 350 U.S. 920 (1955).

[33] For instance, in Baumgartner v. United States, 322 U.S. 665, 670 (1944), the Supreme Court required that the evidence of fraud by one who is alleged to have taken the naturalization oath with mental reservations be "clear, unequivocal, and convincing."

[34] Vidales v. Brownell, 217 F.2d 136, 138 (9th Cir. 1954).

our Constitutional history and the express language of the Constitution itself: "All legislative Powers herein granted shall be vested in a Congress of the United States, . . . "[35] and "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[36]

That the sovereignty of the people of the United States is vested in the people and not in the national government except to the extent provided for in the Constitution is a proposition so fundamental and accepted that it surely needs no citation in its support. Is it conceivable that the people of the United States; so cautious about creating a general government that a Bill of Rights was necessary before adoption of the Constitution could be secured, knowingly created a government which could rob them of all the blessings of liberty which many of them came to America to secure and which the Bill of Rights was calculated to insure—rob them by the simple device of declaring them to be aliens because they had married a foreigner, committed a crime, or performed some other act in good faith such as staying in a foreign country to take care of ill relatives or business interests beyond the period of time fixed by law for their return? Is it conceivable that the people, who accepted the Constitution reluctantly at best, recognized that in the general government to which specific powers had been given there was a lurking sovereignty with power to cast the creators of the government out?

If such was the mind of the people at the time they adopted the Constitution, if such was the mind of the framers, then why was it necessary to grant Congress the power to enact naturalization laws? For if there was to be an undefined sovereign power in the Congress to take away citizenship, certainly there would also be an equivalent

[35] U.S. Const. art. I, § 1.

[36] U.S. Const. amend. X.

power to grant it. If the general government is clothed with powers not expressed "because it has the character of nationality," why was it necessary to make specific provision for declaring war or making treaties?

The doctrine of sovereign or inherent power was soundly repudiated by the Supreme Court in *Kansas* v. *Colorado*.[37] Said the Court:

> But the proposition that there are legislative powers affecting the nation as a whole which belong to, although not expressed in the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the Amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things.[38]

The doctrine has, however, found support in the matter of exclusion and regulation of aliens. In *Fong Yue Ting* v. *United States*,[39] the Supreme Court upheld a statute providing for deportation of any Chinese laborer who did not procure a certificate of registration. The Court based its judgment solely upon an inherent sovereign power in the Congress to do all things necessary for the exclusion or regulation of aliens within our borders. Support for the doctrine may also be found in *United States* v. *Curtiss-Wright Export Corp.*,[40] wherein the Court sustained presidential regulation, pursuant to resolution of Congress, of the shipment of arms to foreign countries engaged in conflict. The Court expressed the opinion that:

> It results that the investment of the federal government with the powers of external sovereignty did not

[37] 206 U.S. 46 (1907).

[38] *Id.* at 89.

[39] 149 U.S. 698 (1893). *Accord*, cases cited note 8, *supra*.

[40] 299 U.S. 304 (1936).

> depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the Federal government as necessary concomitants of nationality.[41]

It plainly appears that the doctrine of delegated powers that the Congress can exercise only those powers granted it and none other—and the doctrine of sovereign power are at war with one another.[42] What the resolution of the conflict will be with respect to Congressional authority to deprive a person of his citizenship remains to be seen. In *Curtiss-Wright* the Court spoke of sovereign power over external affairs. Are shipping arms to foreign warring nations and regulating aliens within our borders, as external affairs, distinguishable from the division of water between Colorado and Kansas, as an internal or domestic matter? If there is such a distinction, to which class—external or domestic—belongs the loss of citizenship? There is still time for the Court to repudiate the doctrine of sovereign power as it applies to loss of citizenship. *MacKenzie* v. *Hare*,[43] as indicated earlier, did not decide the question on that ground, but rather on the ground that Mrs. MacKenzie had voluntarily given up her citizenship by voluntarily marrying a foreigner. It is submitted that if the doctrine gains acceptance in the matter of loss of citizenship, then the Constitution may be suspended for any minority class by converting such class into a group of aliens by the force of law and shipping them off to some place provided for that purpose.

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[41] *Id.* at 318.

[42] The controversy is not limited to the cases. See book reviews of CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES, Sharp, 54 COLUM. L. REV. 439 (1954), Durham, 41 CALIF. L. REV. 209 (1953), and Stern, 49 NW. U. L. REV. 107 (1954).

[43] 239 U.S. 299 (1915).

B. The Doctrine of Voluntary Expatriation.

It has long been established that the citizen can by his own choice and volition give up his citizenship, renounce his allegiance to the United States, and assume allegiance to some other nation.[14] Whether a citizen has done so or not is a question of fact to be established by what he intended to do as shown by what he has said and done.[15] The government has frequently urged upon the courts the proposition that Congress has the power to declare what acts, when voluntarily done, shall constitute voluntary expatriation. *MacKenzie* v. *Hare*[16] is a good example. It will be recalled that Mrs. MacKenzie had voluntarily married a foreigner and had therefore voluntarily expatriated herself, under the statute[17] providing that any American woman who should marry a foreigner should take the nationality of her husband. The Supreme Court's latest and most cited decision applying the proposition is *Savorgnan* v. *United States*.[18] The petitioner, American born, desired to marry an Italian Vice Consul. By Italian law, the Vice Consul could marry only Italian citizens. After a period of hesitation, she signed a formal document applying for Italian citizenship, signed an oath of allegiance and renounced American citizenship. All documents were in the Italian language, but she knew their import. The trial court made specific findings of fact that while she intended to acquire Italian citizenship she had ". . . no intention of

[14] See Slaymaker, *Right of the American Citizen to Expatriate*, XXXVII Am. L. Rev. 191 (1903).

[15] There are no decisions squarely in point on the facts. On the law, *cf.* Tot v. United States, 319 U.S. 463 (1943); Morrison v. California, 291 U.S. 82 (1934); Western & Atl. R.R. v. Henderson, 279 U.S. 639 (1929); Bailey v. Alabama, 219 U.S. 219 (1911).

[16] 239 U.S. 299 (1915).

[17] Act of March 2, 1907, c. 2534, 34 Stat. 1228 (repealed by 54 Stat. 1172 (1940)).

[18] 338 U.S. 491 (1950).

endangering her American citizenship or of renouncing her allegiance to the United States." She went to Italy for a few years and then sought to return to the United States as a citizen but was turned back. The government invoked Sec. 401 (a) and (b) of the Nationality Act of 1940[49] against her, which provided that a citizen would lose his nationality upon obtaining naturalization in a foreign country or taking an oath of allegiance to another sovereign. The petitioner contended that she did not intend to give up her American citizenship and that her intent should prevail. The Supreme Court, in holding that she had expatriated herself under the act, said, "there is no suggestion in the statutory language that the effect of the specified overt acts, when voluntarily done, is conditioned upon the undisclosed intent of the person doing them," adding that "whatever the legal consequences of those acts may be, she is bound by them."[50] Here again is the idea that when one voluntarily performs an act which Congress says is expatriating, the person is expatriated whether he intended to give up his citizenship or not. One cannot have too much sympathy for the petitioner, since she did all that anyone would require in the way of evidence showing an intent to expatriate. It seems likely in this case that the Supreme Court felt the good lady had really intended to do just what she did, since she knowingly signed the request for naturalization and the oath of allegiance to Italy, but that the Court felt bound by the specific finding of fact by the District Court that ". . . she had no intention of endangering her American citizenship or of renouncing her allegiance." What she did as established by the other evidence in the case seemed so clearly indicative of an intent to divest herself of American citizenship and take up that of Italy that the result—expatriation—seemed inescapable, despite her expressed state of mind to the contrary. As it turned out, *Savorgnan*

[49] 54 STAT. 1137 (later amended by 8 U.S.C. 1401-1503 (1952)).

[50] 338 U.S. at 499, 502.

merely interpreted the statute and did not as much as notice the lurking question of Congressional power. It does not appear that the issue was ever raised.

It is impossible to reconcile the decisions of the lower federal tribunals interpreting and applying the various provisions of the Nationality Act of 1940. They number in the hundreds. A substantial majority of the cases hold that the persons involved were not expatriated under the act. Most of the cases reaching this result do so on the grounds that the act—voting in a foreign political election,[1] serving in a foreign army or taking an oath of allegiance to a foreign government,[2] staying beyond the statutory period specified for return to this country by persons formerly of another nationality[3]—must be voluntary to effect expatriation.[4] Hardly any of the cases consider the distinction as to whether the citizen simply did the act voluntarily,[5] or

[1] *E.g.*, Nakashima v. Acheson, 98 F. Supp. 11 (S.D. Cal. 1951); Kuwabara v. Acheson, 96 F. Supp. 38 (S.D. Cal. 1951); Onye v. Acheson, 91 F. Supp. 129 (D. Hawaii 1950).

[2] *E.g.*, Acheson v. Maenza, 202 F.2d 453 (D.C. Cir. 1953); Dos Reis *ex rel.* Camara v. Nicolls, 161 F.2d 860 (1st Cir. 1947); Riccio v. Dulles, 116 F. Supp. 680 (D. D.C. 1953); Murata v. Acheson, 99 F. Supp. 591 (D. Hawaii 1951); Okimura v. Acheson, 99 F. Supp. 587 (D. Hawaii 1951); Kato v. Acheson, 94 F. Supp. 415 (S.D. Cal. 1950).

[3] *E.g.*, Mendelsohn v. Dulles, 207 F.2d 37 (D.C. Cir. 1953).

[4] The legislative history of the Nationality Act of 1940 would indicate that when Congress provided for loss of citizenship as a result of voting in a foreign election, serving in a foreign army, etc., that it meant voluntarily doing so. Acheson v. Maenza, 202 F.2d 453 (D.C. Cir. 1953); Dos Reis *ex rel.* Camara v. Nicolls, 161 F.2d 860 (1st Cir. 1947).

[5] For the most part the trial courts have been indulgent in finding duress or coercion, in order to avoid a judgment that a party had lost his citizenship, even where the pressure or influence was slight. See Note, "*Voluntary*": *A Concept in Expatriation Law*, 54 Colum. L. Rev. 932 (1954).

whether he voluntarily gave up his citizenship *as evidenced* by the voluntary and knowing doing of the act.

The major problem raised by cases like *MacKenzie* v. *Hare* and *Savorgnan* v. *United States* is whether the Congress can constitutionally make the doing of an act such as voting in a foreign political election or marrying a foreigner conclusive of the question of expatriation. For if the Congress does not have the power to provide for loss of citizenship, it cannot indirectly achieve that end by making the doing of an act which may or may not have a relationship to voluntary expatriation conclusive proof of the latter. A number of courts deciding cases brought under the Nationality Act of 1940 have been conscious that the question was present.

The District Court for Hawaii, McLaughlin, J., has specifically raised the question in a series of cases. In the first,[56] the court held a native born citizen not to have expatriated herself when she voted in a Japanese election in 1946, not knowing about the provisions of the Nationality Act of 1940 imposing loss of citizenship from voting in such elections, and voting because she had been led by army authorities to believe that it was the thing to do and for the further reason that her family urged her to vote for fear that she would lose her rice ration card if she didn't. The court found that the citizen's voting was not the result of free and independent choice, nor the result of her free and voluntary act, and expressed the view that "the benefits of citizenship can be renounced, lost or waived only as the result of free and intelligent choice."[57] In a second case, *Okimura* v. *Acheson*,[58] the same court held that serving in the Japanese army and voting in the post war election of 1946 did not cause the loss of citizenship under the

[56] Onye v. Acheson, 97 F. Supp. 129 (D. Hawaii 1950).

[57] *Id.* at 131.

[58] 99 F. Supp. 587 (D. Hawaii 1951).

Nationality Act of 1940. The person involved had dual citizenship—that of the United States by virtue of birth in Hawaii, and that of Japan by virtue of birth to Japanese nationals. Judge McLaughlin wrote: "Our concern is, rather, where in the Constitution is to be found any grant of power—specific or reasonably implied—by which Congress is authorized to divest an American born citizen of his nationality because, having also Japanese nationality, he served in the Japanese army or voted in an election in Japan?"[59] The court then declared the Nationality Act of 1940 unconstitutional insofar as it purported to take away citizenship for doing the acts and nothing more. The Supreme Court vacated the judgment and remanded the case to the District Court with the cryptic direction: "... for specific findings as to the circumstances attending appellee's services in the Japanese army and voting in the Japanese elections, and the reasonable inferences to be drawn therefrom."[60] The purpose which such findings would serve was not indicated. Did the direction to the District Court to make reasonable inferences from the circumstances of the service and voting mean that expatriation would follow automatically if the service and voting were voluntary; or did the Supreme Court mean that expatriation would result only if the circumstances attending the service and voting evidenced an intent to give up United States citizenship? Whatever the real purpose in the guarded language of the Supreme Court, the District Court on reconsideration of the case found that the army service was coerced, not voluntary, but that there was no evidence that the voting was done under legal coercion or duress. The court then ruled[61] that the service, being involuntary, was not expatriating, and that there was no expatriation from voting because the Act of 1940, providing for loss of

[59] *Id.* at 589.

[60] Acheson v. Okimura, 342 U.S. 899 (1952).

[61] Okimura v. Acheson, 111 F. Supp. 303 (D. Hawaii 1953).

citizenship from voting, without more, was unconstitutional. In a third and later case,[62] on facts almost identical with those of *Okimura*, the same court raised the question of Congressional power in the pointed words quoted above at page 66. The court followed its earlier ruling that Congress does not have power to take away citizenship indirectly by making an overt act conclusive of expatriating intent in the absence of a showing that the act establishes the intent.

It appears that the District Court was well advised in holding that proof of voting in a Japanese election by a person who was a citizen of both the United States and Japan could not be taken as conclusive proof of an intent to forfeit citizenship. As a procedural device, the presumption of expatriation arising from voting or from long residence in another country, desertion from the armed forces, marrying a foreigner, or what have you is valid only if there is a rational connection between the fact proven and the fact to be presumed; and if the presumption is not applied in such a way as to preclude the person against whom it runs from making his defenses. The cases make it crystal clear that a court or jury cannot be compelled to conclude that a person has voluntarily renounced his citizenship upon proof only that the person voted in a foreign election, held a public office in another country, or stayed away from the United States beyond a period fixed by statute.[63] To do so is to deprive the person of liberty without due process of law. If the deprivation of citizen

[62] Terada v. Dulles, 121 F. Supp. 6 (D. Hawaii 1954).

[63] *Cf.* Tot v. United States, 319 U.S. 463 (1943); N.Y. Life Ins. Co. v. Gamer, 303 U.S. 161 (1938); Morrison v. California, 291 U.S. 82 (1934); Western & Atl. R.R. v. Henderson, 279 U.S. 639 (1929); Manley v. Georgia, 279 U.S. 1 (1929); McFarland v. American Sugar Co., 241 U.S. 79 (1916); Luria v. United States, 231 U.S. 9 (1913); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911); Bailey v. Alabama, 219 U.S. 219 (1911); Mobile, Jackson & Kansas City R.R. v. Turnipseed, 219 U.S. 35 (1910).

ship as the result of doing certain acts is to be considered a matter of substance rather than procedure—that is, the voting, desertion, marrying a foreigner, living too long abroad, is prohibited and the penalty for violation is loss of citizenship—we are confronted again with the principal question of power of Congress, for if Congress cannot take away citizenship by legislative fiat directly, it cannot take citizenship away indirectly.[64]

In view of these principles, in addition to the principle pronounced in the *MacKenzie* case, that "It may be conceded that a change of citizenship cannot be arbitrarily imposed, that is, imposed without concurrence of the citizen,"[65] it seems that the *MacKenzie* case was wrongly decided. For if the Congress cannot take away the citizenship of a person without his concurrence, it cannot do so indirectly by making the performance of some other act such as marrying a foreigner conclusive proof of concurrence.

C. Effect of the Fourteenth Amendment.

Prior to the ratification of the Fourteenth Amendment to the Constitution, the only provision in that instrument having anything to do with acquisition of the status of citizenship was the power given to Congress "To establish an uniform Rule of Naturalization."[66] Congress has never attempted to expand this power into a power to denationalize.[67] Rather, Congress itself has interpreted this power

[64] *Cf.* Bailey v. Alabama, *supra* note 55.

[65] 239 U.S. at 311.

[66] U.S. Const. art. I, § 8.

[67] Denaturalization proceedings are predicated on failure of an applicant for naturalization to comply with all the conditions for acquiring naturalized citizenship, and in effect the judgment rests on a finding that citizenship was never really acquired. Knauer v. United States, 328 U.S. 654 (1946); Baumgartner v. United States, 322 U.S. 665 (1944); Schneiderman v. United States, 320 U.S. 118 (1943).

to mean "the conferring of nationality of a state upon a person after birth, by any means whatsoever."[68] Perhaps the scope of the naturalization power was indelibly fixed by an early dictum of Chief Justice Marshall, speaking of the rights of citizens: "The Constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national legislature is, to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual."[69]

The Fourteenth Amendment fixes the definition of those who are to be citizens by declaring that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States. . . ."

Those who would contend for a sovereign or inherent power in the Congress to make aliens out of citizens seem not to have considered the effect of the naturalization power and the Fourteenth Amendment. To admit that Congress can take away citizenship, taken together with the expressed power to grant citizenship by naturalization, renders the Fourteenth Amendment futile and surplusage. For then, citizens are not "All persons born or naturalized in the United States," but all persons born or naturalized in the United States from whom Congress has not withdrawn citizenship.[70] It is not easy to suppose that the Congress which proposed and the states which ratified the Amendment intended to do a futile thing. Furthermore, if it had been the intention of the framers to allow the

[68] 66 Stat. 166 (1952), 8 U.S.C. § 1101 (1952).

[69] Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, 827 (1824).

[70] The logic of the proposition is no less compelling that prior to the ratification of the Fourteenth Amendment all white persons, at least, born within the jurisdiction of the United States, excepting only children of ambassadors or public ministers of a foreign government, were native born citizens of the United States. See United States v. Wong Kim Ark, 169 U.S. 649 (1898).

status of citizens to be affected by the Congress, they knew how to employ language to achieve that purpose. There are numerous places where the Constitution fixes status, specifies qualifications or vests powers subject to modification by the Congress. For instance, it is declared in art. I, § 4, that "The times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." And in art. III, § 2: "In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." If it had been their intent to authorize Congress to restrict the qualifications of citizens, the framers knew how to do so. It is significant that they did not do so.

But the matter need not be left to general reasoning. The Supreme Court itself has clearly interpreted the Fourteenth Amendment as putting beyond the reach of Congress any power to modify the status of the citizen. In *United States* v. *Wong Kim Ark*,[71] the petitioner, born in the United States of Chinese parents in 1873, was excluded from the United States on return from a temporary visit to China in 1895, upon the government's sole ground that he was not a citizen of the United States. It was agreed by the government that if Wong Kim Ark was a citizen, " . . . the acts of Congress, known as the Chinese Exclusion Acts, prohibiting persons of the Chinese race, and especially Chinese laborers, from coming into the United States, do not and cannot apply to him."[72] While agreeing that the Chinese Exclusion Acts[73] would not operate to

[71] 169 U.S. 649 (1898).

[72] *Id.* at 653.

[73] 22 STAT. 58 (1882); 23 STAT. 115 (1884); 25 STAT. 476, 504 (1888); 27 STAT. 25 (1892); 28 STAT. 7, 390 (1894) (later repealed by 57 STAT. 600 (1943)).

keep Wong Kim Ark out if he were a citizen, the government contended that he was not a citizen despite his birth in the United States because Congress had not, by any of the statutes defining those who might be naturalized, made persons born to Chinese parents eligible for citizenship. While the Supreme Court defined the question to be decided in narrow terms ("The question presented by the record is whether a child born in the United States, of parents of Chinese descent . . . becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the Fourteenth Amendment of the Constitution. . . . ")[74] it was necessary, in order to dispose of that question, to decide whether the exclusion of Chinese from citizenship under the naturalization acts or from entry into the country, because they were Chinese laborers, effectively stripped those persons of citizenship acquired by birth in the United States or prevented the acquisition of citizenship by such persons born in the United States. The language of the Court, considered by some to be a dictum, but really necessary for the decision of the case, seems so plain as to lay at rest for all time any contention that Congress can by law impair or alter the status of citizenship acquired by operation of the Constitution. It said:

> The acts of Congress, known as the Chinese Exclusion Acts, the earliest of which was passed some fourteen years after the adoption of the Constitutional Amendment, cannot control its meaning, or impair its effect, but must be construed and executed in subordination to its provisions. And the right of the United States, as exercised by and under those acts, to exclude or to expel from the country persons of the Chinese race, born in China, and continuing to be subjects of the Emperor of China, though having acquired a commercial domicil in the United States, has been upheld by this court, for reasons applicable to all aliens alike, and inapplicable to citizens, of whatever race or color.[75]

[74] 169 U.S. at 653.

[75] *Id.* at 6.

And further:

> The power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away. . . . Congress, having no power to abridge the rights conferred by the Constitution upon those who have become naturalized citizens by virtue of acts of Congress, *a fortiori* no act or omission of Congress, as to providing for the naturalization of parents or children of a particular race, can affect citizenship acquired as a birthright, by virtue of the Constitution itself, without any aid of legislation. The Fourteenth Amendment, while it leaves the power, where it was before, in Congress, to regulate naturalization, has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship.[76]

It must be noted in passing that the Supreme Court, in holding that Congress could not impair or abridge citizenship, recognized the existence of an undefined sovereign power to exclude or expel aliens.[77] It would seem that *Wong Kim Ark*, at least as respects citizens and aliens, settles the controversy between the exponents of a sovereign power in Congress and the exponents of limited government (see p. 72 [p. 16a] *supra*).

It is a little surprising that the question of the power of Congress should have been raised in so few of the cases. An exception is *Terrida v. Dulles*[78] in which the question was squarely presented whether the Nationality Act of 1940 as amended, decreeing loss of citizenship of one who voluntarily voted in a foreign political election, was within the power of Congress. In his carefully considered opinion, Judge McLaughlin applied *Wong Kim Ark*, holding that the Congress had no such power as that asserted and re-

[76] *Id.* at 703.

[77] *Id.* at 699.

[78] 121 F. Supp. 6 (D. Hawaii 1954).

jecting both the doctrine that Congress had a sovereign power to deprive one of citizenship and the doctrine that Terada had, by voluntarily voting, conclusively expatriated himself.

IV. Conclusions

Citizenship in the United States, a status of inestimable value, is looked upon by some as a cloak which can be stripped from a person by force of Congressional legislation, leaving the person an alien, subject to deportation or exclusion from the United States. The idea has become a serious threat to personal liberty and if accepted can become the instrument by which whole classes of people may be exorcised from the society. Congress has already taken the first steps by enacting legislation declaring that the doing of certain acts, some of which do not even remotely suggest that intent to expatriate was present in the doer, will result in loss of citizenship.

The claim for such a power in Congress was given the breath of life by a dictum in *MacKenzie v. Hare* wherein the Supreme Court seemed inclined to extend the powers of Congress by asserting for the national legislature a sovereign or inherent power, not expressed, to determine what acts performed by a citizen would result in loss of citizenship. But the force of the dictum was spent in the very case in which it was announced when the Court declared that loss of citizenship could be effected only by concurrence of the citizen. The doctrine of sovereign power in Congress to take away citizenship, equal to the sovereign power in Congress to expel or exclude aliens, seems to have been definitely repudiated by *Wong Kim Ark*.

Choosing not to rely upon a sovereign power in Congress to deprive of citizenship, the Supreme Court in *MacKenzie* did hold that voluntarily doing an act specified by Congress—marrying a foreigner—was the cause of automatic loss of citizenship. Indeed, the Court must have concluded

that Mrs. MacKenzie had voluntarily and knowingly given up her citizenship, because the Court said that she could not be deprived of citizenship without her concurrence. But the plain facts of the case indicate that she was unaware of the effect of her marriage to a foreigner, and nothing in the case as much as faintly suggests that she concurred in loss of her citizenship. Indeed, her conduct would indicate that she intended to stay in this country and act like a citizen, including participating in the election process. In so finding, the Court treated the statutory loss of citizenship from marrying a foreigner as a presumption—indeed, as a conclusive presumption. It should be noted that the case was not remanded to the trial court for a finding on the question of Mrs. MacKenzie's concurrence. Concurrence was held as a matter of law to flow from a finding that she had married a foreigner. In numerous other cases in which the validity of presumptions received adverse consideration the Court has labelled unconstitutional statutes creating arbitrary presumptions or presumptions which precluded a person from presenting his defenses. In *MacKenzie*, the Court effectively deprived the petitioner from rebutting the fact of concurrence. The decision runs counter to the firmly established rule, and it does not seem likely that the Court will repeat the error in a case in which the Court is fully advised.

The Constitution itself, without importing into it doctrines contrary to the very philosophy of the document, affords no basis whatever for a power in Congress to take away a person's citizenship. Rather, the Constitution unequivocally says who are citizens. While it conspicuously gives Congress power to confer citizenship by naturalization, it just as conspicuously omits any specification of a power to alter or take away the status of citizenship. The Supreme Court, in *Wong Kim Ark*, in a pronouncement considered in some quarters as dictum, but which was actually given full consideration and actually necessary for the decision of the issues as presented, squarely rejected

the power claimed for the Congress to withdraw citizenship conferred upon a person by the Constitution.

We must conclude that he is bold indeed who, on a careful analysis of the cases, labels as an irresponsible adventurer one who would deny to the Congress a power to take away the most valued right that any person can claim, his citizenship.